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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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April 4, 1963.

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	2
I. The Decision Below is Clearly Correct	3
II. There is no Conflict of Decision	8
III. There is No Important Question of Federal Law	9
CONCLUSION	10

Table of Citations

Cases:

	PAGE
Allis-Chalmers Mfg. Co. v. *Commonwealth Edison Co.*, No. 13903 (7th Cir., March 29, 1963)	6
American Tobacco Co. v. *People's Tobacco Co.*, 204 Fed. 58 (5th Cir. 1913)	4
Bailey v. *Glover*, 21 Wall. 342 (1875)	3, 4
Blau v. *Albert*, 157 F. Supp. 816 (S. D. N. Y. 1957)	4
Brigham City Corp. v. *General Electric Co.*, 210 F. Supp. 574 (D. Utah 1962), *rev'd*, No. 7211 (10th Cir., March 15, 1963)	9
Burnham Chemical Co. v. *Borax Consolidated, Ltd.*, 170 F. 2d 569 (9th Cir. 1948), *cert. denied*, 336 U. S. 924 (1949)	5, 6
City of Burlington v. *Westinghouse Electric Corp.*, 1963 Trade Cas. ¶70,684 (D. D. C. 1963)	8
City of San Antonio v. *General Electric Co.*, Civ. No. 3063 (W. D. Tex., Dec. 7, 1962)	8
Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.*, 210 F. Supp. 557 (N. D. Ill. 1962), *aff'd*, No. 13903 (7th Cir., March 29, 1963)	8
Department of Water & Power v. *Allis-Chalmers Mfg. Co.*, 1963 Trade Cas. ¶70,651 (S. D. Calif. 1963)	8
Exploration Co. v. *United States*, 247 U. S. 435 (1918)	3
Glus v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959)	3
Grossman v. *Young*, 72 F. Supp. 375 (S. D. N. Y. 1947)	4
Holmberg v. *Armbrecht*, 327 U. S. 392 (1946)	3, 4, 6
Kansas City v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (8th Cir. 1962)	6
Kansas City v. *Federal Pacific Electric Co.*, 210 F. Supp. 545 (W. D. Mo. 1962), *rev'd* 310 F. 2d 271 (8th Cir. 1962)	9

PAGE

Moviecolor, Ltd., v. *Eastman Kodak Co.*, 288 F. 2d 80 (2d Cir. 1961), *cert. denied*, 368 U. S. 821 (1961) 4, 6

Public Service Co. of Colorado v. *Allen-Bradley Co.*, 1962 Trade Cas. ¶70,549 (D. Colo. 1962), *aff'd* No. 7183 (10th Cir., March 15, 1963) 8

Public Service Co. of New Mexico v. *General Electric Co.*, No. 7140 (10th Cir., March 15, 1963) 6

Public Service Co. of New Mexico v. *A. B. Chance Co.*, 1962 Trade Cas. ¶70,551 (D. N. M. 1962), *rev'd* No. 7140 (10th Cir., March 15, 1963) 9

Schwegmann Brothers v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) 7

Soriano v. *United States*, 352 U. S. 270 (1957) 7

Tinkoff v. *United States*, 211 F. 2d 890 (7th Cir. 1954) 5

United States v. *General Electric Co.*, 209 F. Supp. 197 (E. D. Pa. 1962) 8

Winkler-Koch Engineering Co. v. *Universal Oil Products Co.*, 100 F. Supp. 15 (S. D. N. Y. 1951) 4

STATUTES:

Clayton Act (15 U. S. C. §§15, 15b, 16(b)):

Section 4 2, 7

Section 4B 2, 3, 5, 6, 7, 8

Section 5(b) 2, 3, 7

Federal Farm Loan Act (12 U. S. C. §812):

Section 16 4

MISCELLANEOUS:

101 Cong. Rec. 5129-33 (1955) 6, 7

H. R. 7905, 81st Cong. 2d Sess. (1950) 5

APPENDIX E

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (App. A of Petition) is reported at 207 F. Supp. 613. The opinion of the United States Court of Appeals for the Second Circuit which affirms the District Court with one dissent (App. B of Petition) is reported at 312 F. 2d 236.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether fraudulent concealment by the defendants of a cause of action arising under Section 4 of the Clayton Act may toll the running of the limitation periods contained in Sections 4B and 5(b) of the Clayton Act.

Statutes Involved.

The pertinent provisions of the Clayton Act, 15 U. S. C. §§15, 15b and 16(b), are set forth in the Petition at pages 2 and 3.

Statement.

The relevant facts are adequately stated in the Petition.

Argument.

The decision below is so clearly correct that review by this Court is unwarranted. The Court of Appeals followed well-established precedents in holding that those who violate the antitrust laws may not insulate themselves from treble-damage liability by fraudulently concealing their unlawful practices from their victims. The correctness of the decision is evidenced by the singular unanimity of opinion among the lower courts in this conclusion; three other courts of appeals have so held, as have seven district courts, and the three district courts reaching a contrary result have all been reversed.

I.

The Decision Below is Clearly Correct.

In holding that fraudulent concealment of their unlawful acts by treble-damage defendants tolls the running of the limitation periods contained in Sections 4B and 5(b) of the Clayton Act, the Court of Appeals did nothing more than apply the well-established doctrine that no man may take advantage of his own wrong. As recently as 1959, this Court reaffirmed the applicability of this doctrine to toll the running of statutes of limitations in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 232-33 (1959):

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

As specifically applied to bar reliance on statutes of limitations by those who fraudulently conceal their unlawful acts from their victims, this doctrine has been consistently applied by this Court since 1875: *Bailey* v. *Glover*, 21 Wall. 342 (1875); *Exploration Co.* v. *United States*, 247 U. S. 435 (1918); *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946); and as Mr. Justice Frankfurter stated in *Holmberg*:

> "This equitable doctrine is read into every federal statute of limitation" (327 U. S. at 397).

As the Court of Appeals correctly held, the legislative history of Section 4B demonstrates that Congress intended the *Holmberg* rule to be read into this enactment.

In their effort to minimize the applicability of the fraudulent concealment doctrine, the petitioners contend (Petition, p. 13) that it does not apply in actions at law and is limited to fraud cases. These contentions are without merit. Although the doctrine originated in equity, this fact has never inhibited its application in actions at law, as was settled in *Bailey* v. *Glover*:[1]

> "It is quite clear that this statute [of limitations] must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language it must be one which applies under the same state of facts to suits at law as well as to suits in equity.
>
> "But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity" (21 Wall. at 349).

Nor is the doctrine limited to fraud cases. *Holmberg* itself did not involve an action based on fraud but was an action to enforce the double liability imposed upon shareholders of a joint stock land bank by Section 16 of the Federal Farm Loan Act, 12 U. S. C. §812. The only fraud there involved was concealment of the ownership of the stock. Thus, the *Holmberg* doctrine, as clearly articulated

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[1] The doctrine of fraudulent concealment has been applied to actions at law in *Moviecolor, Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80 (2d Cir. 1961), *cert. denied*, 368 U. S. 821 (1961); *American Tobacco Co.* v. *People's Tobacco Co.*, 204 Fed. 58 (5th Cir. 1913); *Blau* v. *Albert*, 157 F. Supp. 816 (S. D. N. Y. 1957); *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 100 F. Supp. 15 (S. D. N. Y. 1951); *Grossman* v. *Young*, 72 F. Supp. 375 (S. D. N. Y. 1947).

in 1946, was a well-settled and generally applicable policy of the law when Congress considered and passed Section 4B in 1955. There is no reason of policy why this all-embracing doctrine should be confined either to equity or fraud cases, and indeed the petitioners suggest no policy justification for their technical and unsound distinctions.

Moreover, the petitioners' contention that Section 4B's legislative history demonstrates a Congressional rejection of the doctrine (Petition, pp. 14-15) cannot survive careful analysis. In their effort to locate the nonexistent Congressional intent to negate fraudulent concealment, the petitioners have referred to the legislative history of various unpassed bills which would have provided a statute of limitations in treble-damage actions (Petition, App. E). These bills bear no relation to the doctrine of fraudulent concealment. Accordingly, the fact that they were not passed is irrelevant, even assuming that actions of earlier Congresses have a material bearing on the intention of the Congress which enacted Section 4B. These bills would have permitted a plaintiff with a cause of action based upon a conspiracy to sue "within six years after the plaintiff *discovered* (or, by the exercise of reasonable diligence, should have discovered) *the facts relied upon for proof of the conspiracy*" (H. R. 7905, 81st Cong., 2d Sess., introduced on March 29, 1950; emphasis added), or equivalent language. As is readily apparent, these provisions differ from the fraudulent concealment doctrine in two vital respects—(a) they focus on discovery by the plaintiff of evidence to be used at trial rather than of the existence of the cause of action, *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569 (9th Cir. 1948), *cert. denied*, 336 U. S. 924 (1949); *Tinkoff* v. *United States*, 211 F. 2d 890, 892 (7th Cir. 1954); and (b) they would toll the statute

until such discovery, even absent fraudulent concealment by the defendants. These distinctions, as noted by the Court of Appeals (Petition, App. B, p. 10b, fn. 9), conclusively demonstrate the irrelevance of the prior bills.[2]

In an apparent attempt to minimize these distinctions, the petitioners (Petition, pp. 8-9) argue that all conspiracies are by their nature concealed. This is not the case. See *Moviecolor, Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 87 (2d Cir. 1961), *cert. denied*, 368 U. S. 821 (1961) (allegations of the complaint held to negate concealment of the conspiracy); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569 (9th Cir. 1948), *cert. denied*, 336 U. S. 924 (1949). The fraudulent concealment doctrine relates to the concealment of the very existence of the cause of action, whether that cause of action is conspiracy or, as in *Holmberg*, ownership of bank stock.

In contrast to the irrelevant history of prior bills which the petitioners cite, the legislative history of Section 4B itself makes it clear that Congress was aware of the *Holmberg* doctrine when it passed the statute. Congressman Celler, the Chairman of the House Judiciary Committee and floor manager of the bill which became Section 4B stated on several occasions during the House debate that case law provided for tolling until discovery in cases of conspiracy and fraud and that there was no intention to change the law in this respect. 101 Cong. Rec. 5129, 5130, 5132-33 (1955). An example is the following colloquy with Congressman Patman at page 5129:

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[2] The Courts of Appeals for the Seventh, Eighth and Tenth Circuits have reached the same conclusion. *Allis-Chalmers Mfg. Co.* v. *Commonwealth Edison Co.*, No. 13903 (7th Cir., March 29, 1963); *Kansas City* v. *Federal Pacific Electric Co.*, 310 F. 2d 271, 278-80 (8th Cir. 1962); *Public Service Co. of New Mexico* v. *General Electric Co.*, No. 7140 (10th Cir., March 15, 1963).

"Mr. Patman. Does that 4 years apply to conspiracy cases? Suppose there is a conspiracy, and it is 10 years before the conspiracy is known.

"Mr. Celler. In the case of conspiracy or fraud, the statute only runs from the time of discovery.

"Mr. Patman. From the time of the discovery?

"Mr. Celler. In conspiracy cases and cases of fraud.

"Mr. Patman. And it is not the object or intention to change that at all?

"Mr. Celler. That is correct."

Congressman Celler's remarks, as sponsor of the bill, are entitled to great weight in determining the statute's meaning. *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394-95 (1951). They conclusively show that it was the intention of Congress to leave the applicability of the doctrine of fraudulent concealment to actions brought under Section 4 of the Clayton Act exactly the same after enactment of Section 4B as it was before.

The petitioners also argue (Petition, pp. 19-21) that the amendment of Section 5(b) (15 U. S. C. §16(b)) at the same time as the enactment of Section 4B evidences a Congressional desire to limit tolling of the statute to the one situation there provided for—during the pendency of a government action. Aside from the fact that the tolling provisions of Section 5(b) were substantially present in the statute since the passage of the Clayton Act in 1914, the two situations can in no way be considered analogous. Tolling during a government action could be achieved only by express statutory authority; fraudulent concealment was already well established by a long-standing line of judicial precedent. And petitioners' citation of *Soriano* v. *United States*, 352 U. S. 270 (1957) (Petition, p. 17) in

support of their contention that Congress need not negative every possible exception to a statute of limitations is inapposite, as pointed out by the Tenth Circuit, because that case specifically dealt with actions against the government and involved the principle that the government's consent to be sued should be narrowly construed. Moreover, it is clear that this Court has regarded the doctrine that no man may profit by his own wrong as unique in its general applicability, and Congress must be deemed to intend application of this doctrine in the absence of clear expression to the contrary.

The fraudulent concealment doctrine and the more general principle that no man may take advantage of his own wrong are well-established and, before these litigations, have never been seriously questioned. The correctness of the decision below is crystal clear, and no need for review by this Court is present.

II.

There is No Conflict of Decision.

The issue of whether fraudulent concealment may toll the operation of Section 4B has been presented to ten district courts in the course of the electrical equipment litigations. Of these courts, seven have held the doctrine applicable, and three, including the district court in the present case, have been affirmed.[3] The three courts reaching a

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[3] *City of San Antonio* v. *General Electric Co.*, Civ. No. 3063 (W. D. Tex., Dec. 7, 1962); *Department of Water & Power* v. *Allis-Chalmers Mfg. Co.*, 1963 Trade Cas. ¶ 70,651 (S. D. Calif. 1963); *Public Service Co. of Colorado* v. *Allen-Bradley Co.*, 1962 Trade Cas. ¶ 70,549 (D. Colo. 1962), *aff'd*, No. 7183 (10th Cir., March 15, 1963); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 210 F. Supp. 557 (N. D. Ill. 1962), *aff'd*, No. 13903 (7th Cir., March 29, 1963); *United States* v. *General Electric Co.*, 209 F. Supp. 197 (E. D. Pa. 1962); *City of Burlington* v. *Westinghouse Electric Corp.*, 1963 Trade Cas. ¶ 70,684 (D. D. C. 1963).

contrary result have been reversed by the Courts of Appeals for the Eighth and Tenth Circuits.[4] Consequently, there is complete unanimity of opinion among the federal courts on this question, and there is no necessity for review by this Court.

III.

There Is No Important Question of Federal Law.

From the foregoing discussion it is apparent that there is no important unresolved question of federal law presented by the Petition. The Petition argues the importance of a definitive resolution of the applicability of the doctrine of fraudulent concealment to these cases because of their massive and complex nature. We do not believe that this argument should move the Court to take the unusual step of granting review at this interlocutory stage of this litigation and at a time when there is no conflict of decision. However, were it to do so, we submit that the decision below is so clearly correct that the Court should follow its established practice of summary affirmance, when granting certiorari in situations of this kind, thus avoiding further delay.

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[4] *Kansas City* v. *Federal Pacific Electric Co.*, 210 F. Supp. 545 (W. D. Mo. 1962), *rev'd*, 310 F. 2d 271 (8th Cir. 1962); *Brigham City Corp.* v. *General Electric Co.*, 210 F. Supp. 574 (D. Utah 1962), *rev'd*, No. 7211 (10th Cir., March 15, 1963); *Public Service Co. of New Mexico* v. *A. B. Chance Co.*, 1962 Trade Cas. ¶ 70,551 (D. N. M. 1962), *rev'd*, No. 7140 (10th Cir., March 15, 1963).

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

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